Yap Sow Fong @ Yap Ah Yit v Lam Joo King & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–23–53 OF 1998
MOHD HISHAMUDIN J
25 FEBRUARY 2004

Civil Procedure — Stay of proceedings — Application for — Agreement for stay pending delivery of decision of High Court in other suit — Decision not delivered three years after conclusion of trial of other suit — Whether grave injustice would be caused if plaintiff prevented from proceeding with present action

Civil Procedure — Stay of proceedings — Application for — Agreement for stay pending delivery of decision of High Court in other suit — Whether implicit term in agreement for stay that decision delivered within reasonable time — Whether three-year delay in delivering judgment reasonable

LJK and others ('the defendants') filed an action against YSF (who was the plaintiff in the present action) on 24 September 1996 ('the other suit'). In the other suit, the defendants claimed that YSF had wrongfully converted a substantial number of shares in a company. The defendants had made several police reports alleging that YSF had fraudulently caused the shares to be transferred in her name. In the present suit, which was filed in 7 August 1998, YSF claimed damages against the defendants for defamation arising from the police reports made against her. The defendants then filed an application to strike out the present suit. Prior to the trial of the other suit, the defendants' solicitors, with the agreement of YSF's solicitors, wrote to the deputy registrar to seek an adjournment of the striking out application pending the determination of the other suit by the court, on the grounds that a determination of the other suit would substantially decide the factual basis of the present suit. The adjournment was allowed and an agreement to stay was accordingly recorded on 3 February 1999 ('the agreement to stay'). The trial of the other suit was completed in July 2000 and at the conclusion of the trial, the court reserved judgment. No decision was delivered yet. Meanwhile, the defendants made an application that the proceedings of the present suit be stayed pending the delivery of the decision of the High Court judge in the other suit.

Held, dismissing the defendants' application:

(1) Three and a half years (or four years since the date of the agreement to stay) had passed since the conclusion of the trial of the other suit and to date, there was no decision given in respect of the other suit. Therefore, grave injustice would be caused to YSF if the High Court were to prevent her from proceeding with the present action. Also, there was no injustice caused to the defendants, or any abuse of the process of court, if this court were to proceed with the proceedings in the present suit (see para 17).

(2) In respect of the agreement to stay, it was an implicit term in the agreement that the parties agreed to the stay of the present suit only on condition that the court in the other suit delivers its decision within a reasonable time. Three and a half years (or four years from the date of the agreement to stay) was not a reasonable time, all the more when there was an absence of any plausible explanation as to why no decision had been given (see para 18).

[**Bahasa Malaysia summary**

LJK dan lain-lain ('defendan-defendan') memfailkan satu tindakan terhadap YSF (yang merupakan plaintif dalam tindakan semasa) pada 24 September 1996 ('guaman lain'). Dalam guaman lain, defendan-defendan menuntut bahawa YSF telah dengan salah menukar sebahagian besar saham-saham syarikat. Defendan-defendan telah membuat beberapa laporan polis mengatakan bahawa YSF telah secara palsu menyebabkan saham-saham yang akan memindahkan dalam nama beliau. Dalam guaman semasa, yang difailkan pada 7 Ogos 1998, YSF telah menuntut ganti rugi terhadap defendan-defendan untuk fitnah yang timbul daripada laporan-laporan polis tersebut yang dibuat terhadap beliau. Defendan-defendan kemudian memfailkan satu permohonan untuk membatalkan guaman semasa. Sebelum perbicaraan guaman lain, peguam-peguam defendan-defendan, dengan persetujuan peguam-peguam YSF, menulis kepada timbalan pendaftar untuk memohon satu penangguhan pembatalan permohonan sementara menunggu penentuan guaman lain oleh mahkamah, atas alasan-alasan bahawa satu penentuan guaman lain akan akhirnya memutuskan asas faktual guaman semasa. Penangguhan tersebut telah dibenarkan dan satu persetujuan untuk pergantungan telah dengan sewajarnya direkodkan pada 3 Februari 1999 ('persetujuan untuk penggantungan'). Perbicaraan guaman lain telah diselesaikan pada bulan Julai 2000 dan di penutup perbicaraan, mahkamah telah menangguh penghakiman. Tiada keputusan telah dibuat. Sementara itu, defendan-defendan telah membuat satu permohonan agar prosiding guaman semasa digantung sementara menunggu penyampaian keputusan hakim Mahkamah Tinggi dalam guaman lain tersebut.

Diputuskan, menolak permohonan defendna-defendan:

(1) Tiga tahun setengah (atau empat tahun dari tarikh persetujuan untuk penggantungan) telah berlalu sejak kesimpulan mahkamah guaman lain tersebut dan setakat ini, tiada keputusan telah diberikan berkaitan guaman lain tersebut. Oleh itu, ketidakadilan ketara telah berlaku terhadap YSF jika Mahkamah Tinggi menghalang beliau daripada meneruskan dengan tindakan semasa. Juga, tidak akan berlakunya ketidakadilan ke atas defendan-defendan, atau apa-apa penyalahgunaan proses mahkamah, jika Mahkamah ini meneruskan dengan prosiding guaman semasa (lihat perenggan 17).

(2) Berhubung persetujuan untuk penggantungan, ia adalah terma tersirat dalam persetujuan tersebut bahawa pihak-pihak bersetuju untuk menggantung guaman semasa hanya dengan syarat bahawa mahkamah dalam guaman lain tersebut menyampaikan keputusannya dalam tempoh munasabah. Tiga tahun setengah (atau empat tahun dari tarikh persetujuan untuk penggantungan) bukan satu tempoh yang munasabah, lebih-lebih lagi dengan ketiadaan apa-apa penjelasan yang munasabah kenapa tiada keputusan telah diberikan (lihat perenggan 18).]

Notes

For cases on application for stay of proceedings, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5503–5513.

For stay of proceedings, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) paras [10.06-076]–[10.6-081].

Cases referred to

Robertson v Cilla [1956] 3 All ER 651 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19, O 92 r 4

Alvin Teo (Lee Ong & Kandiah) for the plaintiff.
IN Jeganathan (SK Yeoh & Partners) for the defendants.

Mohd Hishamudin J:

[1] This summons in chambers (encl 13) is an application by the defendants that the proceedings of the present suit be stayed pending the delivery of the decision of the High Court judge in another suit, namely, Kuala Lumpur High Court Civil Suit No D1–24–336 of 1996 ('the other suit').

[2] The present application is made pursuant to O 92 r 4 of the Rules of the High Court 1980. This rule provides:

> Inherent powers of the Court
>
> 4 For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[3] The writ and statement of claim in the present suit was filed on 7 August 1998.

[4] The other suit was filed earlier, that is to say, on 24 September 1996. In the other suit, all the defendants in the present suit together with three other persons are the plaintiffs; whilst the plaintiff in the present suit, together with three other persons and a company known as 'Lam Kee Ying Sdn Bhd' ('the company') are named as the defendants.

[5] In the other suit, the plaintiffs in that suit claim that the first defendant therein (ie the plaintiff in the present suit) had wrongfully converted a substantial number of shares in the company. It is alleged that the shares so converted belong to the plaintiffs in the other suit.

[6] Now, the following facts are not in dispute. In the course of the proceedings in the other suit, the plaintiff in the present suit, as one of the defendants in the other suit, filed an affidavit. In the said affidavit, she alleges that the defendants in the present suit (being four of the seven plaintiffs in the other suit) had transferred their shares in the company to her. The defendants in the present suit, after reading this affidavit, made several police reports alleging that the plaintiff in the present suit had fraudulently caused the shares to be transferred to her name.

[7] In the present suit, the plaintiff alleges that she is the director of the company (this is disputed by the defendants) and she claims damages against the defendants for defamation. The plaintiff alleges that the defendants had maliciously made false police reports against her; the false information being the allegation that she had fraudulently caused shares in the company belonging to the defendants to be transferred to her name.

[8] In the present suit, the statement of defence was duly filed by the defendants on 25 September 1998, In the statement of defence, the defendants claim that the contents of their police reports are true in substance and in fact. Alternatively, the defendants plead qualified privilege.

[9] On 5 October 1998, the defendants in the present suit filed vide a summons in chambers (encl 3) an interlocutory application:

(a) to strike out the statement of claim of the present suit pursuant to O 18 r 19 of the Rules of the High Court 1980 on the grounds that the statement of claim is frivolous and vexatious and/or an abuse of the process of court; or, alternatively,

(b) to consolidate the present suit with the other suit.

[10] Subsequent to the filing of this striking out application (encl 3), the other suit was fixed for trial on 5–9 April 1999.

[11] However, prior to the trial, the defendants' solicitors in the present suit, with the agreement of the plaintiffs solicitors in the present suit, by letter dated 25 January 1999, wrote to the deputy registrar of the court seeking an adjournment of the striking out application pending the determination of the other suit by the court at the conclusion of the scheduled trial in April. The reason given for seeking the adjournment was that a determination of the other suit by the court would substantially decide the factual basis of the present suit. The adjournment was allowed and an agreement to stay was recorded by the court on 3 February 1999.

[12] The trial of the other suit was, however, completed only in July 2000; and at the conclusion of the trial, the court reserved judgment. But after a lapse of more than two years, no decision was delivered. So, on 2 October 2002, the solicitors (Messrs Lee Ong *&* Kandiah) for the defendants in the other suit (who are solicitors for the plaintiff in the present suit) wrote to the secretary of the learned judge requesting that a decision be given as soon as possible. However, there appears to be no reply to that letter and until today (more than three and a half years after the completion of the trial of the other suit) the decision has yet to be delivered.

[13] In the present suit, the application (encl 13) for stay of proceedings by the defendants that is now before me was filed on 20 February 2003. What prompted the defendants to file the present application is a letter by the plaintiffs solicitors (Messrs Lee Ong & Kandiah) to the defendants solicitors (Messrs SK Yeoh & Partners) notifying the latter of the plaintiffs intention to proceed with the defendants' striking out application (encl 3).

[14] The ground given by the defendants for this stay of proceedings application is the 'agreement to stay' of 3 February 1999. The defendants submit that this court should await the decision of the court in respect of the other suit before proceeding further in the present suit. It is argued that this is necessary in order to prevent injustice to the defendants, that is to say, to avoid inconsistent decisions on the same factual disputes; or, alternatively, to prevent an abuse of the process of court by the plaintiff, that is to say, to prevent the plaintiff from repudiating the stay agreement.

[15] The plaintiff, in opposing the defendants' application, on the other hand, submits that the proceedings of the present suit should not be stayed indefinitely, citing *Robertson v Cilia* [1956] 3 All ER 651. She contends that this court has no power to grant an indefinite adjournment.

[16] The principle of law that I can abstract from *Robertson v Cilia* is that a court in considering whether or not to grant an adjournment is also duty bound to consider whether or not the duration of the adjournment asked for is reasonable or not under the circumstances. In this case cited, on the facts including the financial conditions prevailing in the United Kingdom then, described as the credit squeeze, the court held that an adjournment of one year to enable a mortgagor to pay a mortgage debt was unreasonable. Upjohn J said (at p 655):

> It cannot, in my judgment, be a reasonable exercise of my discretion to adjourn the hearing for as long as one year in the mere hope that the financial position of the country will ease and that the defendant will be able to find someone able and willing to lend him money to discharge the plaintiff's mortgage.

[17] In my judgment, I fail to see any injustice caused to the defendants, or any abuse of the process of court by the plaintiff being allowed or facilitated by this court, if this court were to proceed with the proceedings in the present suit. As noted above, not only a period of three and a half years (or four years from the date of the agreement to stay — 3 February 1999) has passed but a reminder had also been sent to the secretary of (he learned judge. And the pertinent fact is that until today, not only was there no reply to the reminder, but there is also no decision given on the other suit. Under the circumstances, it is my judgment that a grave injustice will, instead, be caused to the plaintiff in the present suit if this court were to prevent the plaintiff from proceeding with the present action. The plaintiff has been more than patient. It is ridiculous and grossly unfair to compel her to wait any longer.

[18] As for the agreement to stay of 3 February 1999, in my judgment, the question of repudiation of that agreement by the plaintiff does not arise at all. I hold that it is an implicit term in the agreement that the parties agree to the stay of the present suit only on condition that the court in the other suit deliver its decision within a reasonable time. In my view, without doubt the three and a half years (or four years from the date of the agreement to stay — 3 February 1999) that have since passed is not a reasonable time; and all the more so in the absence of any plausible explanation as to why, right until today, no decision has been given. I am certain that on 3 February 1999, the parties, including the court that recorded the agreement to stay, never had in mind that the stay should be indefinite or this long.

[19] This application by the defendants is, therefore, dismissed with costs. A date shall now be fixed for the hearing of the defendants' application at encl 3.

Application dismissed with costs.

Reported by Lim Lee Na